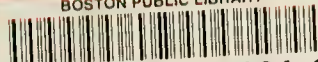
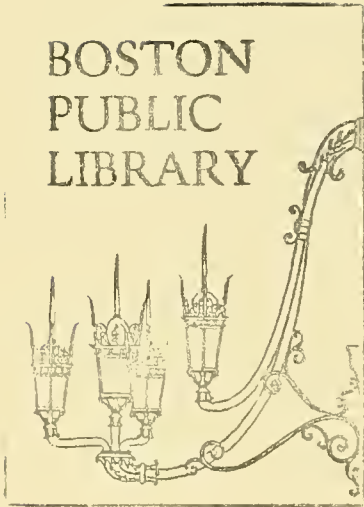


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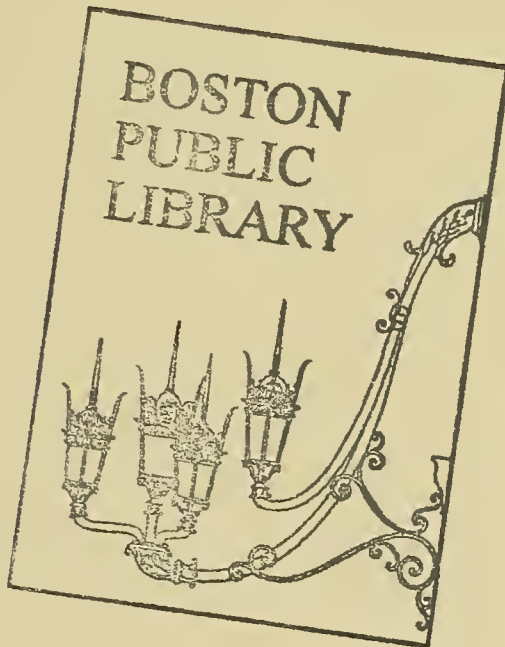
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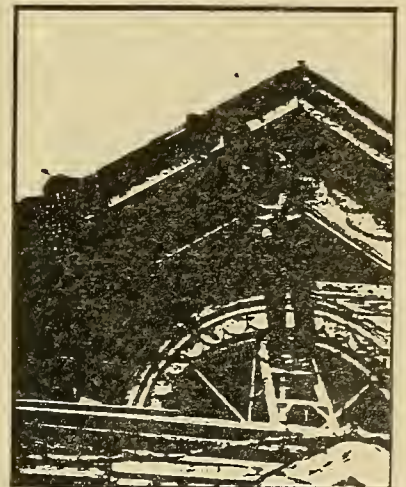
Public Hearing on
Zoning Text Amendment
Article 26A and 26B

THE LINKAGE
REGULATION

BRIEFING MATERIAL



(Circle 1986)



City of Boston, Raymond L. Flynn, *Mayor*
Boston Redevelopment Authority
Robert L. Farrell, *Chairman*
Joseph J. Walsh, *Vice Chairman*
James K. Flaherty, *Treasurer*
Clarence J. Jones, *Assistant Treasurer*
Michael F. Donlan, *Member*
Kane Simonian, *Secretary*
Stephen Coyle, *Director*

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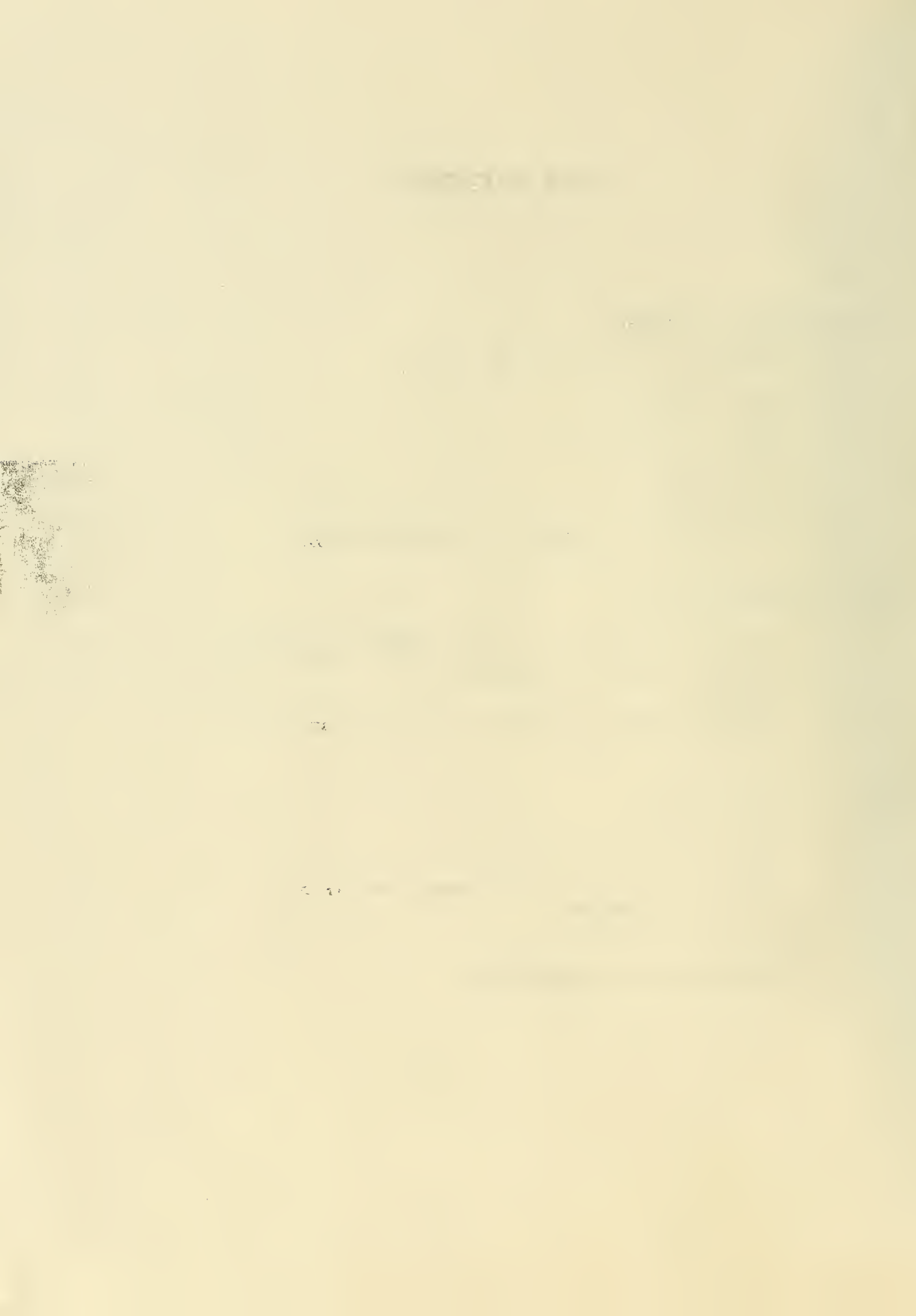
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Flynn would tie linkage fee to jobs plan

By Michael K. Frisby
Globe Staff

Mayor Flynn, in an effort to expand Boston's linkage program, is proposing zoning changes that would establish the nation's first job-training program financed by linkage fee payments and make developers increase and speed up payment of such fees.

Flynn wants to change the city's two-year-old linkage formula, which requires developers to build low- to moderate-income housing or to pay into a housing trust \$5 per square foot of construction on projects exceeding 100,000 square feet.

Under Flynn's proposals, in the form of zoning ordinances that must first be approved by the Zoning Commission, the payments would be increased by \$1 per square foot and the current 12-year payment period would be reduced to seven years.

Two years ago, under former Mayor Kevin H. White's administration, the city adopted the linkage concept as a method of sharing the wealth derived from downtown development with the city's neighborhoods.

Flynn, who campaigned two years ago on the promise that he would help the neighborhoods, said yesterday he will not only seek to shorten the linkage payment period, but will also require developers to start payments when construction begins rather than when the buildings are completed, as is now required. In addition, the extra dollar per square

KEY ELEMENTS

Following are the major points of the mayor's proposal:

- Increase linkage payments to \$6 per square foot, from \$5, on construction projects exceeding 100,000 square feet.
- Reduce the payment period to seven years, from 12.
- Require that payments begin at the start of construction, rather than when the buildings are completed.
- Establish the nation's first linkage-financed job-training plan.

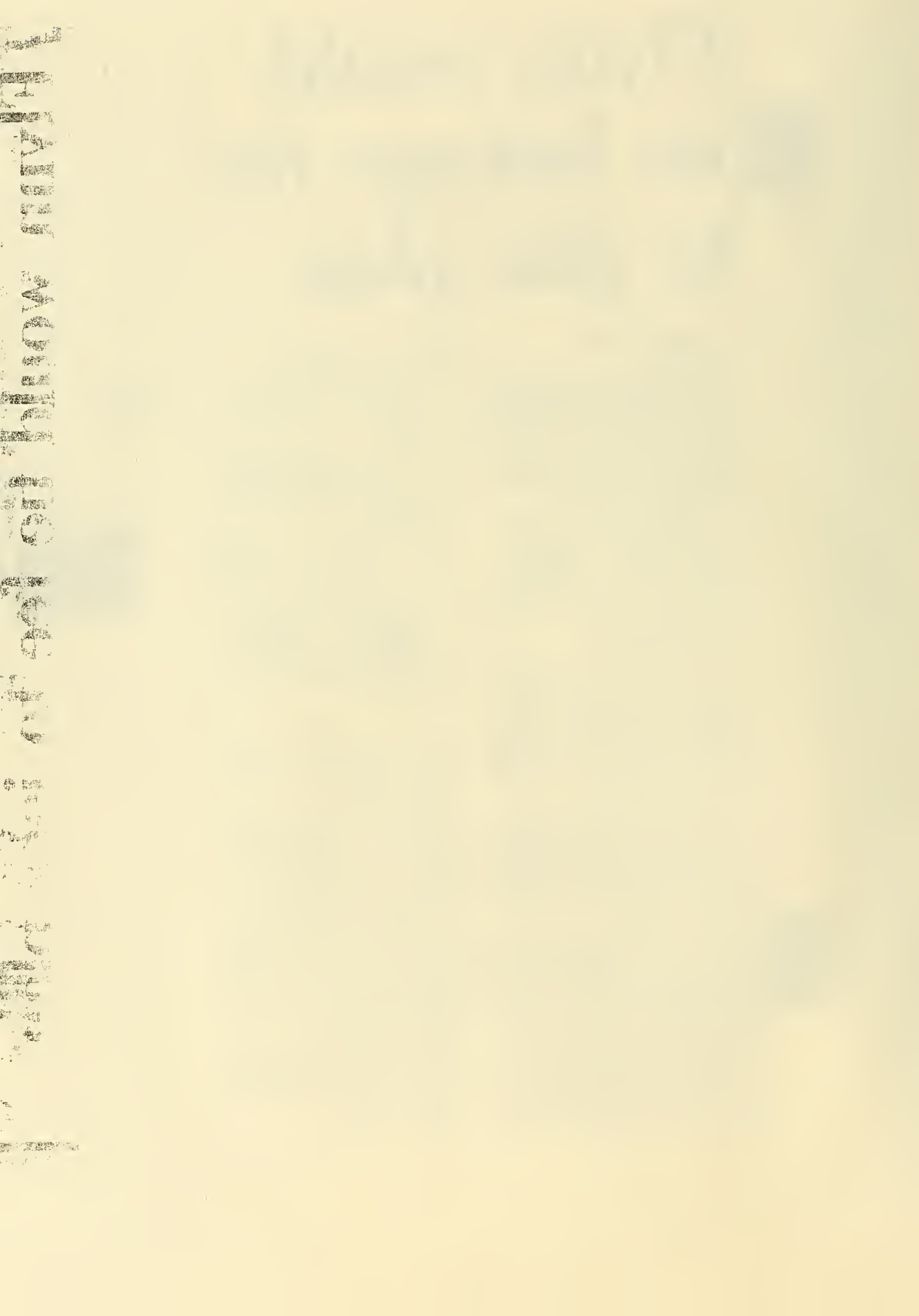
foot to be used to finance a job-training program must be paid over two years.

Flynn last night called the proposed changes "very important because there is major economic development in the downtown area and it is important that it is shared with the neighborhoods."

"We want to expand job training and opportunities to the people who have been previously left behind," he said, adding that his proposal may not meet with approval from all the housing activists or the developers.

"Policy decisions don't always have the approval of everyone," said Flynn. "They must be decisive and be for the good of the city."

LINKAGE, Page 13



Flynn would tie fee to jobs plan

LINKAGE

Continued from Page 1

These proposals will continue economic growth and benefit the neighborhood.

Limited exemption

Flynn wants to spark neighborhood construction projects and, to that end, his proposals to alter the linkage formula exempt developers who choose to build in the neighborhood by allowing them to pay linkage fees on the current 12-year schedule, although they will have to pay the extra dollar toward job training.

Flynn also seeks to set aside at least 20 percent of the linkage payments raised from neighborhood development for housing initiatives and job training for the specific neighborhood surrounding the site of the construction project.

Ned Sullivan, the city's policy director, said a major benefit of the changes proposed by Flynn will be the increase in the present value of the linkage payments.

Sullivan said if the city follows through on plans to borrow against the current schedule of linkage payments, financial institutions will lend the city an amount based on about \$2.50 per square foot. But, he said, that loan

amount would increase to \$5 per square foot under the proposed changes.

Flynn's proposals seemed to receive a lukewarm reception yesterday from housing activists, who have lobbied for more extensive changes, and developers, who had previously contended that the changes may be too costly.

Coalition concerned

The Boston Linkage Action Coalition, a group of several housing organizations, has called on Flynn to increase linkage payments to \$10 per square foot and eliminate the exemption for projects under 100,000 square feet.

Yesterday, Evelyn Hannigan, a coalition co-chairwoman, said organizations members had a good relationship with Flynn, but are concerned because they had been promised a meeting with the mayor or to discuss their own linkage proposals. Such a meeting has not taken place, she said.

"We do not accept this as a final position," on linkage, said Hannigan. "We will press for an immediate meeting with the mayor to discuss linkage. We were promised a meeting, but it never happened."

Flynn acknowledged that he had not met with the housing activists, but said a member of his administration had talked with them over the weekend.

Meanwhile, some developers, such as John T. Fallon, chairman of R. M. Bradley Co., have supported linkage with reservations. Fallon has previously said that it would be difficult for developers to begin making their payments at the start of construction.

Sullivan, however, maintained that "the program will benefit the neighborhood and also sustain downtown development by not overbuilding like other American cities."

Sullivan said the job-training section was suggested by developers who wanted the city to find a way to train members of minority groups, city residents and women to work on the construction projects.

He said the proposals contain a provision allowing the city to respond to changes in the economy and further alter the linkage formula after three years.

Boosing trust named

Yesterday, Flynn also named a three-member housing trust board to review proposals by developers wanting to build houses

rather than make linkage payments and to allocate linkage money to be spent on housing.

Flynn named Collector-Treasurer George Russell Jr., District Councillor Thomas M. Menino (Hyde Park-Roslindale) and Larry Dwyer, director of the community schools program, to the board.

Meanwhile, Sullivan cautioned that linkage funds are not as much as some activists believe and must be managed properly to have a significant impact on the city's housing stock.

"If the \$35 million from the 10 downtown developments was used for housing construction, it would provide only 500 units of affordable housing," said Sullivan. He said the money would be better used in combination with other funds - public and private - that would produce more housing.



Flynn plan 'doubles' developer fee

By BRIAN MOONEY

MAYOR RAY Flynn took the wraps off plans yesterday to double the cost of "linkage" payments by downtown developers and added a job training component to the housing development fund.

But Flynn plans to implement the program by executive order, which may draw fire from a City Council that has been unable for over a year to agree on an ordinance setting up a trust to administer the program.

To do business in Boston, developers must pay a linkage fee which is applied to the construction of neighborhood housing.

Flynn said his new proposal "balances the need to continue economic development and expand it to the neighborhoods."

He said an activist coalition's demand that the linkage fee be quadrupled went too far.

Flynn's revisions, in the

works for nearly a year, would make the following changes in the 1983 formula set up under his predecessor, Kevin White:

- Require big commercial developers to pay \$5 a square foot for all projects over 100,000 feet, the same as the existing formula, but begin payments 18 to 24 months sooner and shorten the payout period from 12 to 7 years. The funds would still be used to create new affordable housing.

Would hike, speed up housing payments

will be "almost double" the existing formula, which has generated \$35 million in commitments the city will start receiving next year.

Though the fee is increasing by only a dollar, the table makes its "net present value" \$4.78 a foot, Sullivan said.

The existing formula costs \$2.58 a foot, reflecting a decline of about 10 percent a year over the longer payout period, he said.

- Add a \$1-a-foot fee to go into a new fund for job training but payable over two years.

- A "sunset provision" to review the formulas after three years.

The proposals, amendments to the city's zoning code, must be OK'd by Flynn's Zoning Commission and the Boston Redevelopment Authority board.

Policy Director Neil Sullivan said developers' costs

Flynn will also sign an executive order this week establishing the Neighborhood Housing Trust that will allot linkage funds for housing.

The three-member trust will consist of City Councilor Thomas Menino, Collector-Treasurer George Russell and Community Schools Director Larry Dwyer.

Flynn said he bypassed a council ordinance because, "it's the mayor's responsibility, and there was so much division on the council" over the neighborhood trust last year.

High-rise for skyscraper fee

By BRIAN MOONEY

MAYOR Ray Flynn's administration is eyeing bigger "linkage" payments for downtown skyscrapers, planning to use those funds for job-training as well as housing, The Herald has learned.

A Boston Redevelopment Authority "Downtown Guidelines" planning report obtained by The Herald calls for:

● Increasing downtown deve-

Flynn wants 'linkage' increases

lopers' linkage payments to \$6 per square foot, from \$5, on skyscrapers and shortening the payment period to five years, from 12. The first \$5 would go to create new housing units, with the extra dollar going into a new job-training fund.

● Require all linkage payments for floor areas above 300 feet to be paid in a lump sum when building permits are issued, rather than staggered over five years.

● Set up an "open space trust fund" for neighborhood parks and playgrounds, using 15 percent of the proceeds of sale or lease of public property.

● Create 5,000 to 10,000 parking spaces, focusing on "peripheral" areas like the Southwest Corri-

dor, Prudential Center and North and South stations.

● Require commercial developments of over 100,000 square feet to develop child care plans for their tenants.

● Target early linkage payments to abandoned housing rehabilitation.

● Limit the height of skyscrapers in different "economic revitalization" zones — generally to 350 feet, but in special cases up to 500 feet.

● Require wind tunnel testing and minimal shadows from new buildings "to protect the ecology of the central city."

● Encourage "mixed income diversity" by subsidizing 20 percent of the units in new housing developments.



Summary of Article 26A and 26B

Article 26A, which is the new housing linkage program, includes the following:

- o Developers of downtown commercial buildings will make payment of \$5 per square foot for each square foot of floor area over 100,000 sq. feet
- o Payments will be made over seven years
- o First payment will be due upon issuance of the building permit
- o 20% of the housing contribution will be targeted to the impacted neighborhood
- o College dormitories have been excluded from the list of uses subject to linkage requirements in both downtown and the neighborhoods
- o Developers of commercial buildings outside of the downtown will continue to make the \$5 per square foot payments over twelve years, beginning with the certificate of occupancy or two years after the building permit, whichever comes first
- o The housing contribution will be recalculated every three years after passage of this amendment, based on housing and economic trends in city

Article 26B, the new job training linkage program, includes the following:

- o Developers of commercial buildings throughout the city will make payments of \$1 per square foot for each square foot of floor area over 100,000 square feet
- o Payments will be made over two years
- o First payment will be due upon issuance of the building permit
- o The jobs contribution will be recalculated every three after the passage of the amendment, based on employment and economic trends

NEW LINKAGE PROGRAM



DOWNTOWN

Jobs
payable at building permit
\$1 over 2yrs

+

Housing
payable at building permit
\$5 over 7 yrs

NEIGHBORHOODS

Jobs
payable at building permit
\$1 over 2yrs

+

Housing
payable at certificate of
occupancy or
2 years
after building permit
\$5 over 12 yrs

TEXT AMENDMENT NO.

THE COMMONWEALTH OF MASSACHUSETTS

CITY OF BOSTON

IN ZONING COMMISSION

The Boston Redevelopment Authority hereby petitions to amend the text of the Boston Zoning Code, as established under Chapter 665 of the Acts of 1956, as amended as follows:

A. By inserting, below Article 26 of said Code, the following article:

ARTICLE 26A

DEVELOPMENT IMPACT PROJECTS - HOUSING

SECTION 26A-1. Statement of Purpose. The purpose of this article is to promote the public health, safety, convenience and welfare; to prevent overcrowding and deterioration of existing housing; to preserve and increase the City's housing stock; to establish a balance between new, large-scale real estate development and the housing needs of the City and to mitigate the impacts of large-scale development on the available supply of low and moderate income housing, by provisions designed to:

1. Afford review and regulation of large-scale real estate development projects which directly or indirectly displace low or moderate income residents from housing units or contribute to an increase in the costs of housing.
2. Increase the availability of low and moderate income housing by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to create low and moderate income housing or to make a housing contribution grant to the Neighborhood Housing Trust ("Trust").

SECTION 26A-2. Definitions.

1. "Development Impact Project", any development in the City in which it is proposed to erect a structure or structures having a total gross floor area (exclusive of all accessory parking garage space) in excess of one hundred thousand (100,000) square feet or to enlarge or extend a structure or structures so as to increase its (or their) gross floor area (exclusive of all accessory parking garage space) by more than one hundred thousand (100,000) square feet or to substantially rehabilitate a structure or structures having, or to have, after rehabilitation, a gross

floor area (exclusive of all accessory parking garage space) of more than one hundred thousand (100,000) square feet; which structure or structures is (are) intended for a use for which the use item number is listed in Table D, Section 26A-3(2)(a), or, for a use for which the use item number is not listed if such Project will directly result in a reduction in the supply of low and moderate income dwelling units as determined by the Boston Redevelopment Authority ("Authority") and which Project requires a variance, conditional use permit, exception, or zoning map or text amendment.

2. "Development Impact Project Plan", a plan for a project which is a Development Impact Project. The Plan shall set forth the proposed location and appearance of structures, open spaces and landscaping, proposed uses of the structure or structures, densities, projected number of employees, proposed traffic circulation, parking and loading facilities, access to public transportation, and proposed dimensions of structures, and may include proposed building elevations, schematic layout drawings and exterior building materials, the neighborhood where the Project is located and the adjacent neighborhoods, and such other matters as the Director of the Authority deems appropriate to his consideration of the proposed construction.
3. "Development Impact Project Contribution", the creation, by the Project applicant, of low and moderate income housing units by means of the Housing Creation Option, or the grant and payment of a sum of money by the Project applicant by means of a Housing Contribution Grant at such rate and in such amount as set forth in Section 26A-3(2), to and for the exclusive benefit of the Neighborhood Housing Trust.
 - (a) The Housing Creation Option shall be met by creating or causing to be created housing units, for occupancy exclusively by low and moderate income residents of the City, at a cost at least equivalent to the amount of the Housing Contribution Grant, and in conformity with written regulations to be adopted by the Authority after public notice and hearing. The actual Housing Creation Contribution may be approved by the Authority only after public notice and hearing.
 - (b) The Housing Contribution Grant shall be made to the Neighborhood Housing Trust in seven (7) equal, annual installments, the first installment due upon the issuance of a building permit. The remaining six (6) payments of the Grant shall be due and payable annually on the anniversary of the first payment. All payments of the Housing Contribution Grant constituting the grant shall be made to the Collector-Treasurer of the City as custodian pending acceptance of such payments for the Trust by the City. Any payments made by the Project applicant to the Neighborhood Housing Trust, on account of the Housing Payment Option, shall be credited against any amounts due to said Trust on account of any neighborhood impact excise which may be assessed by the City.
 - (c) Twenty (20%) percent of any Housing Payment Contribution shall be reserved for the neighborhood or neighborhoods where or adjacent to where the Project is located, as defined in the approved Development Impact Project Plan.

4. "Substantially rehabilitate", to cause alterations or repairs to be made, to a structure or structures, costing in excess of fifty (50%) percent of the physical value of the structure or structures. Physical value of a structure or structures shall be based on the assessed value as recorded on the assessment rolls of the City as of the January 1 preceding the date of the application for Development Impact Project Plan approval.
5. "Neighborhood Housing Trust", a Massachusetts public charitable trust created under the laws of the Commonwealth on November 19, 1985 and administered by the Collector-Treasurer of the City as managing trustee or another trust, if passed by the Council and approved by the Mayor.
6. "Public agency", a department, agency, board, commission, authority, or other instrumentality of the Commonwealth, or of one or more political subdivision(s) of the Commonwealth or of the United States.
7. "Low and moderate income residents", households located in the city whose total annual income is not more than eighty percent (80%) of the median income for the Boston area as set forth in regulations promulgated from time to time by the United States Department of Housing and Urban Development pursuant to the Housing and Community Development Act of 1974, as amended.

SECTION 26A-3. Development Impact Project Requirements. No variance, conditional use permit, exception or zoning map or text amendment for a Development Impact Project shall be granted or adopted unless the following requirements are met:

1. The Authority, after a public meeting, shall have approved a Development Impact Project Plan. No Plan shall be approved by the Authority unless the Authority finds that the Plan conforms to the general plan for the City as a whole and that nothing in such Plan will be injurious to the neighborhood or otherwise detrimental to the public welfare; and
2. The person or persons making application for a variance, conditional use permit, exception of zoning map or text amendment to erect, substantially rehabilitate, enlarge, or extend a structure pursuant to Development Impact Project Plan shall also have entered into an agreement with the Authority to make a Development Impact Project Contribution.
 - (a) For each use listed below, in Table D, a Housing Contribution Grant of five dollars (\$5.00) for each square foot of gross floor area in excess of one hundred thousand (100,000) square feet, shall be required. Uses, other than accessory parking, that are accessory to the uses listed in Table D shall also be subject to the Housing Contribution Grant requirement.

TABLE D: Development Impact Uses

<u>Use</u>	<u>Use Item Numbers</u>
Office	39, 39A, 40, 41, 42
Retail Business and Service	30, 31, 32, 34, 34A, 35, 36, 36A, 37, 37A, 38, 38A, 43, 44, 45, 46, 47, 48, 49, 60, 60A, 61
Institutional and Educational	16, 16A, 18, 19, 20, 20A, 21, 22, 22A, 23, 24, 29
Hotel and Motel, but not including Apartment Hotel	15

- (b) For mixed-use structures in which one or more of the above uses are combined, the above requirements shall apply if the gross floor area devoted to any one or more of the uses shall in the aggregate exceed one hundred thousand (100,000) square feet.
- (c) The formula (amount and rate of payment) for the Housing Contribution Grant for the use categories listed in Table D shall be subject to recalculation three (3) years after the effective date of this provision and every three (3) years thereafter. The Authority, after public notice and public hearing, when appropriate, shall make a recommendation to the Zoning Commission to amend the formula for the Housing Contribution Grant, based on a consideration of the following criteria:
- (i) Economic trends measured in terms including but not limited to development activity, commercial rents per square foot, employment growth, and inflation rates.
 - (ii) Housing trends measured in terms of, including but not limited to, vacancy rates for low and moderate income housing, and production statistics for new dwelling units.
- (d) The Commissioner of Inspectional Services shall not issue any building or use permit with respect to any building, structure, or land within an area covered by a Development Impact Project Plan, unless the Director of the Authority has certified on the application therefor, and on each plan, drawing or specification filed with the Commissioner in connection therewith, that the plans have been subject to design review, and that the plans are consistent with the Authority-approved Development Impact Project Plan and that the applicant has entered into an agreement with the Authority, as provided in Sections 26A-2(3) and 26A-3(2).

3. The following are not Development Impact Projects and will not be subject to the Development Impact Project requirements:
 - (a) Any structure for which a building or use permit is lawfully issued before notice of hearing before the Zoning Commission has first been given respecting adoption of Article 26A, provided that construction work under such a permit is commenced within six months after its issue, and the work proceeds in good faith continuously to completion so far as is reasonably practicable under the circumstances;
 - (b) Any structure for which construction or permanent financing has been secured before notice of hearing before the Zoning Commission has first been given respecting Article 26A, as evidenced by an irrevocable written commitment of a lending institution or a recorded mortgage indenture, and by the borrower's bona fide payment of a loan commitment fee; or
 - (c) Any building or structure which is, or will be, wholly-owned by one or more public agencies.
4. Article 26A supplements and does not repeal Article 26, which shall continue to apply to Development Impact Project Plans that were approved pursuant to Article 26.

SECTION 26A-4. Applicability. The rate of payment set forth in Section 26A-2(3)(b) shall only apply to Development Impact Projects located in an area lying within the boundaries set forth below:

Beginning at the intersection of the southern bank of the Charles River and the centerline of Massachusetts Avenue and running southerly and southeasterly along the centerline of Massachusetts Avenue to the intersection with the centerline of Tremont Street;

Thence running northeasterly along the centerline of Tremont Street to the centerline of East Berkeley Street;

Thence running easterly along the centerline of East Berkeley Street and the West Fourth Street Bridge to the intersection with the centerline of Dorchester Avenue;

Thence running northerly along the centerline of old Dorchester Avenue to the intersection with the edge of land on the northwesterly side of Fort Point Channel;

Thence running northeasterly along the water's edge or the U.S. Pierhead line, whichever shall be more inclusive, to the Metropolitan District Commission Dam at the mouth of the Charles River;

Thence running across the southerly side of the Metropolitan District Commission Dam and along the southerly bank of the Charles River to the beginning point at the intersection thereof with the centerline of Massachusetts Avenue.

The payment schedule set forth in Section 26-2(3)(a) shall apply to Development Impact Projects located in all other areas of the City. Section 26-2(3)(a) provides in relevant part that:

The Housing Contribution Grant shall be made to the Neighborhood Housing Trust in twelve (12) equal, annual installments, the first installment due upon the issuance of a certificate of occupancy for the Project building or twenty-four (24) months after the granting of the building permit, whichever comes first. The remaining eleven (11) payments shall be due and payable annually on the anniversary of the first payment.

Twenty (20%) percent of any Housing Contribution Grant shall be reserved for the neighborhood or neighborhoods where or adjacent to where the project is located, as defined in the Development Impact Project Plan.

Where the boundary described above divides a Development Impact Project, the rate of payment set forth in Section 26A-2(3)(b) shall apply. Use item numbers 11, 12, 13, 13A, 14 and 17 shall be exempt from the provisions of Articles 26 and 26A.

SECTION 26A-5. Severability. The provisions of this Article are severable, and if any such provision or provisions shall be ruled invalid by any decision of court of competent jurisdiction, such decision shall not impair or otherwise affect any other provision of this Article.

- B. By adding to Section 6-3(f) after "Section 26-2," the phrases "Sections 26A-2 and 26B-2," and after "Section 26-3" a comma and the phrases "Sections 26A-3 and 26B-3."
- C. By adding to Section 6A-3(c) after "Section 26-2," the phrases "Sections 26A-2 and 26B-2," and after "Section 26-3" a comma and the phrases "Sections 26A-3 and 26B-3."
- D. By adding to Section 7-3(d) after "Section 26-2," the phrases "Sections 26A-2 and 26B-2," and after "Section 26-3," the phrases "Sections 26A-3 and 26B-3,".

Approved as to form:

Corporation Counsel

Petitioner: _____

By: _____
Stephen Coyle, Director

Address: _____

Tel. No. _____

Date: _____

TEXT AMENDMENT NO.

THE COMMONWEALTH OF MASSACHUSETTS

CITY OF BOSTON

IN ZONING COMMISSION

The Boston Redevelopment Authority hereby petitions to amend the text of the Boston Zoning Code, as established under Chapter 665 of the Acts of 1956, as amended, as follows:

A. By inserting, below Article 26A of said Code, the following article:

ARTICLE 26B

DEVELOPMENT IMPACT PROJECTS - JOB TRAINING

SECTION 26B-1. Statement of Purpose.

The purpose of this article is to promote the public health, safety, convenience and welfare and to mitigate the adverse impacts of new large-scale real estate development projects on existing development by providing for job training for low and moderate income people. In particular, the owners of new commercial uses, which are more capital intensive and less land intensive than industrial uses, can pay more for land than owners of manufacturing uses, therefore these uses directly result in higher land costs and indirectly cause further land price increases by increasing housing demand. Workers will therefore need to be trained so that they will have the job skills necessary to compete for these new jobs. This Article is designed to:

1. Afford review and to regulate large-scale real estate development projects which result in the creation of new jobs, requiring the creation of new job training programs or the expansion of existing ones.
2. Increase the opportunities for job training for low and moderate income people by requiring developers, as a condition of the grant of deviations from the Zoning Code or the grant of an amendment to the zoning map or text, to make a development impact payment to the Neighborhood Jobs Trust.

SECTION 26B-2. Definitions.

1. "Development Impact Project", any development in the City of Boston ("City") in which it is proposed to erect a structure or structures having a gross floor area (exclusive of all accessory parking garage space) in excess of one hundred thousand (100,000) square feet or to

enlarge or extend a structure or structures so as to increase its (or their) gross floor area (exclusive of all accessory parking garage space) by more than one hundred thousand (100,000) square feet or to substantially rehabilitate a structure or structures having, or to have, after rehabilitation, a gross floor area (exclusive of all accessory parking garage space) of more than one hundred thousand (100,000) square feet; which structure or structures is (are) intended for a use for which the use item number is listed in Table E, Section 26B-3; and which development requires a variance, conditional use permit, exception, or zoning map or text amendment.

2. "Development Impact Project Plan", a plan for a project which is a Development Impact Project. The Plan shall set forth the proposed location and appearance of structures, open spaces and landscaping, proposed uses of the structure or structures, densities, projected number of employees, proposed traffic circulation, parking and loading facilities, access to public transportation, and proposed dimensions of structures, and may include proposed building elevations, schematic layout drawings and exterior building materials, and such other matters as the Director of the Boston Redevelopment Authority ("Authority") deems appropriate to his consideration of the proposed construction.
3. "Jobs Contribution Grant", the payment of a sum of money by the Project applicant, which rate of payment is set forth in Section 26B-3(1)(a), to or for the exclusive benefit of the Neighborhood Jobs Trust.
 - a. The Jobs Contribution Grant shall be made to the Neighborhood Jobs Trust in two (2) equal, annual installments, the first installment due upon the issuance of a building permit. The remaining payment shall be due and payable on the anniversary of the first payment. All Jobs Contribution Grants shall be made to the Collector-Treasurer of the City as custodian, pending acceptance of such payments for the Neighborhood Jobs Trust by the City. All Jobs Contribution Grants shall be credited against any amounts due to said Trust on account of any neighborhood impact excise which may be assessed by the City.
4. "Substantially rehabilitate", to cause alterations or repairs to be made, to a structure or structures, within any period of twelve (12) months, costing in excess of fifty (50%) percent of the physical value of the structure or structures. Physical value shall be based on the assessed value as recorded on the assessment roles of the City as of January 1 next preceding the date of the application for Development Impact Project Plan approval.
5. "Neighborhood Jobs Trust", a Massachusetts public charitable trust created under the laws of the Commonwealth on November 19, 1985 and administered by the Collector-Treasurer of the City as managing trustee or another trust, if passed by the Council and approved by the Mayor.
6. "Public agency", a department, agency, board, commission, authority, or other instrumentality of the Commonwealth, or of one or more political subdivision(s) of the Commonwealth, or of the United States.

SECTION 26B-3. Development Impact Project Requirements. No variance, conditional use permit, exception or zoning map or text amendment for a Development Impact Project shall be granted or adopted unless the following requirements are met in addition to those set forth in Section 26A-3:

1. The person or persons making application for a variance, conditional use permit, exception, or zoning map or text amendment to erect, substantially rehabilitate, enlarge, or extend a structure pursuant to a Development Impact Project Plan approval shall also have entered into an agreement with the Authority to make a Jobs Contribution Grant in the amount specified in (a) below.

(a) For each use listed in Table E, a Jobs Payment Contribution of one dollar (\$1.00) for each square foot of gross floor area in excess of one hundred thousand (100,000) square feet, shall be required. Uses, other than accessory parking, that are accessory to the uses listed in Table E shall also be subject to the Jobs Contribution Grant.

TABLE E: Development Impact Uses

<u>Use</u>	<u>Use Item Numbers</u>
Office	39, 39A, 40, 41, 42
Retail Business and Service	30, 31, 32, 34, 34A, 35, 36, 36A, 37, 37A, 38, 38A, 43, 44, 45, 46, 47, 48, 49, 60, 60A, 61
Institutional and Educational	16, 16A, 18, 19, 20, 20A, 21, 22, 22A, 23, 24, 29
Hotel and Motel, but not including Apartment Hotel	15

(b) For mixed-use structures in which one or more of the above uses are combined, the above requirements shall apply if the gross floor area devoted to any one or more of the uses shall in the aggregate exceed one hundred thousand (100,000) square feet.

(c) The formula (amount and rate of payment) for the Jobs Contribution Grant for the use categories listed in Table E shall be subject to recalculation three (3) years after the effective date of this provision and every three (3) years thereafter. The Authority, after public notice and public hearing, where appropriate, shall make a recommendation to the Zoning Commission to amend the formula for the Jobs Contribution Grant, based on a consideration of the following criteria:

- (i) Economic trends measured in terms of, including but not limited to, development activity, commercial rents per square foot, employment growth, and inflation rates.
- (ii) Employment trends measured in terms of, including but not limited to, unemployment rates, and statistics on job training programs.

The resulting analysis will determine the changes in the City's employment training needs and the continuing ability of new, large-scale development to assist in meeting the employment training needs of the City.

- (d) The Commissioner of Inspectional Services shall not issue any building or use permit with respect to any building, structure, or land within an area covered by a Development Impact Project Plan, unless the Director of the Authority has certified on the application therefor, and on each plan, drawing or specification filed with the Commissioner in connection therewith, that the plans have been subject to design review, and that the plans are consistent with the Authority-approved Development Impact Project Plan and that the applicant has entered into an agreement with the Authority, as provided in Sections 26B-2(3) and 26B-3(1).
2. The following are not Development Impact Projects and will not be subject to the Development Impact Project requirements:
- (a) Any structure or structures for which a building or use permit is lawfully issued before notice of hearing before the Zoning Commission has first been given respecting adoption of Article 26B, provided that construction work under such a permit is commenced within six (6) months after its issue, and the work proceeds in good faith continuously to completion so far as is reasonably practicable under the circumstances;
 - (b) Any building or structure for which construction or permanent financing has been secured before notice of hearing before the Zoning Commission has first been given respecting Article 26A, as evidenced by an irrevocable written commitment of a lending institution or a recorded mortgage indenture, and by the borrower's bona fide payment of a loan commitment fee; or
 - (c) Any building or structure which is, or will be, wholly-owned by one or more public agencies.

SECTION 26B-4. Severability. The provisions of this Article are severable, and if any such provision or provisions shall be ruled invalid by any decision of any court of competent jurisdiction, such decision shall not impair or otherwise affect any other provision of this Article.

Approved as to form:

Corporation Counsel

Petitioner: _____

By: _____

Stephen Coyle, Director

Address: _____

Tel. No. _____

Date: _____

PROPOSED AMENDMENT

TO

ARTICLE 26B

RESOLVED THAT ARTICLE 26B IS AMENDED TO INCLUDE THE FOLLOWING SECTIONS:

Section 26B-2(3)(b). Twenty (20%) of any Jobs Contribution Grant shall be reserved for the neighborhood or neighborhoods where or adjacent to where the Project is located, as defined in the approved Development Impact Project Plan.

Section 26B-2(3)(c). Jobs Creation Contribution. A project applicant may use its Jobs Contribution Grant to create a job training program for workers who will be employed, on a permanent basis, at the Project, upon approval by the Director of the Mayor's Office of Jobs and Community Services.

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New Requirements in the Linkage Program

Q. How was linkage established?

A. In December 1983, the Boston Zoning Commission established a "linkage" mechanism under the Boston Zoning Code for the creation of low- and moderate-income housing. It did so by adopting Article 26 of the Zoning Code which requires that developers of large-scale commercial projects make payments into a fund to create affordable housing.

Q. What is the existing linkage program?

A. The current linkage formula requires developers to pay \$5 per square foot for every square foot over 100,000 square feet of new or substantially rehabilitated commercial space. Payments are made in equal installments over twelve years, beginning two years after the issuance of the building permit or upon issuance of the certificate of occupancy, whichever comes first.

Q. What are the new regulations for the linkage program?

A. Article 26A is proposed to be the new housing linkage program. This new regulation reduces the payback period for downtown projects subject to linkage from twelve to seven years, and requires that payments begin at the issuance of a building permit. Neighborhood projects subject to linkage are not affected by this change. Also, under Article 26A, 20 percent of linkage payments, whether from downtown or neighborhood projects, are targeted to the neighborhood where development occurs.

Article 26B proposes a fee of \$1 per square foot over 100,000 square feet of new or substantially rehabilitated commercial space to be used for job training. This money will be collected in two annual installments beginning with the issuance of a building permit. Job training linkage will apply to downtown and neighborhood projects.

Q. What is the combined increase in value of linkage payments resulting from Articles 26A and 26B?

A. The stream of future linkage payments has a value today, its "present value," and that value is nearly doubled by the new regulations. To illustrate, at a 10 percent rate of discount, \$5 paid in equal installments over twelve years (beginning two years after building permit) is worth \$2.58 today. By comparison, \$5 paid in equal installments over seven years beginning with the issuance of a building permit is worth \$3.83 today. An additional stream of \$1 paid in equal installments over two years beginning with the issuance of a building permit is worth 95 cents. Together these streams equal \$4.78 in current dollars, a \$2.20 increase in present value over the existing linkage program.

Q. Why reduce the payback period for downtown projects?

A. By shortening the housing linkage payback period for downtown projects, money will be available sooner for affordable housing. A brief look at the city's housing and demographic statistics illustrates the need for this change. Boston's median household income is 22 percent lower, and its poverty rate is 44 percent higher, than the cities it is most frequently compared with - Dallas, Denver, and San Francisco. The share of per-

son's in "poverty status" in Boston is twice that of the metropolitan area; and more than 21 percent of the residents of Boston in 1985 were in "poverty status".

Moreover, Boston is a city of renters. More than 70 percent of all Boston households rent rather than own their homes. This distinguishes Boston not only from surrounding suburbs, but also from many cities across the country. In 1980, almost 40 percent of Boston's renters were paying rent in excess of 30 percent of their income.

Furthermore, Boston's current housing stock is in trouble. Not including public housing, approximately 900 buildings containing 3000 dwelling units are vacant and boarded. This represents 2 percent of the city's total stock, a higher percentage than in most other cities, including New York, Cleveland, Buffalo, and Newark.

Q. Where will the housing linkage funds be spent?

A. Under the new proposal, 20 percent of the housing contribution will be targeted to impacted neighborhoods.

Q. Where will the jobs linkage funds be spent?

A. A proportion of jobs linkage funds will be targeted also. For example, funds generated by a development project may be spent to train workers for jobs created by that project. Another option, where a project's tenancy is not definite, is to target 20 percent of the jobs linkage generated by the project to the impacted area.

Q. When will the linkage fees be collected?

A. The \$1 per square foot earmarked for job training will be made in two equal annual installments, the first of which will be due upon issuance of the building permit. The housing contribution will be collected over a seven year period upon issuance of the building permit for downtown projects; and over twelve years, beginning the sooner of two years after the issuance of a building permit or upon the issuance of a certificate of occupancy for neighborhood projects.

Q. The additional \$1 per square foot will be used to fund job training programs. Why?

A. Downtown office development and the need for service sector jobs have risen dramatically in Boston over the last ten years. While the city's extraordinary development boom has generated 85,000+ new jobs since 1976, surveys show that Boston residents have not captured a significant share of the higher skilled and higher paying jobs, and consequently, cannot afford adequate housing. At the same time, the city's traditional manufacturing employment base has been eroded. Unless we provide Bostonians with the education and job training necessary to compete for higher skilled positions, Boston residents will not share in the prosperity generated by our economic success. Both the number and proportion of Boston jobs held by Boston residents has fallen sharply over the last three decades. In 1950, Boston residents held 282,080 or 54 percent of Boston jobs; in 1970 that number fell to 203,233 or 37 percent. In 1985, only 181,500 or 31 percent of Boston jobs were held by Boston

residents. Bostonians are losing Boston jobs to suburban counterparts because residents lack the education and skills to compete for higher paying positions.

Q. Why is job training so important?

A. In order to significantly reduce the income gap between Bostonians and their metropolitan neighbors, economic development throughout the city must be linked with jobs. A comprehensive education and job training system is needed to help Boston residents gain a larger share of the job opportunities generated by the new service economy. Boston's business and private sector employers should be programmatically and financially involved in this effort to increase the percentage of Boston jobs held by Boston residents.

Q. What happens after this public hearing?

A. If the BRA Board votes to recommend Articles 26A and/or 26B, these amendments will go before the Zoning Commission for a public hearing. After that public hearing, the Zoning Commission will vote either to adopt or not to adopt Articles 26A and/or 26B. If adopted by the Zoning Commission, the new regulations must then be signed by Mayor Flynn to become part of the Zoning Code.

Q. Will the new regulations affect how the BRA processes DIP (Development Impact Plan Projects) or linkage projects?

A. No. The BRA will continue to process applications in the same manner.

Q. Has any linkage money been collected by the city?

A. To date, approximately 35 million dollars have been earmarked through agreements with developers. The first payments are due April, 1987.

Q. Do other cities have linkage programs?

A. Yes. San Francisco, Seattle, Princeton and Santa Monica all have a linkage program to raise additional funds for housing. San Francisco's programs also requires payments for child care and transit improvements. Boston is the first city in the country to incorporate a fee for job training into zoning regulations.



THE IMPACT OF BOSTON'S DEVELOPMENT
ON HOUSING AND JOB TRAINING NEEDS;
THE PROPOSED NEW LINKAGE PROGRAM
SEEN IN PERSPECTIVE

I. Summary

Boston has been experiencing an extraordinary process of development and job growth for a decade now. A severe housing shortage and inflation of rents have emerged. Job training needs have been exacerbated with the mismatch of the occupational requirements of the new jobs and the skills of many Boston workers. A proposed new linkage regulation is designed to help cope with these circumstances.

The proposed linkage requirement of \$5 a square foot for housing and \$1 for job training, with an estimated "present value" of \$4.78 (in place of \$2.58 under the existing regulation) represents a minimal increase in development costs.

This small cost increase must be seen in the light of the post-"2½" benefits to development, -- the reduction of the burden of property taxes on commercial property, from 18 percent of gross rents, in FY1978, to 10 percent in FY1985. Also relevant are the estimated increases in housing rentals (\$11.28) and in required new housing (\$11.75); and the entry level job training costs (\$1.74) generated by each square foot of downtown office space developed.

II. Development

In the last ten years, 12.2 million square feet of office space have been created and 85,000 net new jobs have been added. Also worthy of note are the construction of 5,000 hotel rooms and 1.2 million square feet of retail space.

Boston's development market is robust. In 1984-85, Boston had the highest level of square feet of office construction per capita of the nation's 20 largest cities. Boston's office vacancy rate (at 11 percent currently) is one of the lowest among large cities and is expected to decline during the course of 1986. Boston office rentals (\$34 a square foot) and hotel room rates (\$76) are among the nation's highest, and the hotel occupancy is a healthy 70 percent.

For the future, the U.S. Bureau of Economic Analysis projects Boston and New England as a high growth region in view of the post-1976 transformation and the relative concentration in those economic activities expanding most rapidly nationally.

Over the coming decade, Boston is projected to build 14 million square feet of office space, add 7,200 hotel rooms, and construct 1 million square feet of net new retail space.

III. Housing Needs and Linkage

While development has generated a growth of 85,000 jobs since 1976, and a population increase of 58,000 since 1980, the expansion of the housing supply has lagged, vacancies have declined, and housing values and

rentals have soared. Housing supply grew only by an average of 900 dwellings a year 1970-79, 1,700 annually 1980-84, and 2,200 in 1985. Vacancies have fallen from 7.5 percent in 1980, to 4 percent in 1985. The rental vacancy rate is reported at 2 percent. One, two and three family homes have risen in value at an average rate of 20 percent a year in the last five years. Advertised apartment rentals start in the \$500+ range. Boston's housing needs over the next decade are estimated at 4,000 dwellings a year. Mayor Flynn has established a production goal of 3,400 dwellings for 1986, in his "State of the City" address earlier this month.

The housing shortage crisis has increased homelessness, displacement is a danger, and Boston's less well-to-do population is threatened. Median household income, at \$21,000 in 1985, is well below that of the metro area. The share of the population living in poverty is greater than that of the nation as a whole (21 percent compared with 14 percent).

Boston residents' income has not kept up with housing costs. As of 1985, 45 percent of Boston's families were paying more than 25 percent of their income for rent.

An expert group has estimated that a square foot of development in Boston raises housing rentals by \$11.28, and that 1.25 million square feet of office construction, per year, increases the city-wide apartment rental bill by \$14 million. They also estimate that housing construction sufficient to mitigate pressure on rentals would cost the equivalent of \$11.75 per square foot of office construction.

The proposed housing linkage payment, with a present value of \$4.59 a square foot, is designed to fund a "Housing Trust Fund" to aid in the construction of affordable housing, and help deal with the impact of development.

IV. Job Training Needs and Linkage

Boston resident workers have difficulty taking advantage of Boston's development and job growth. Boston resident worker participation in Boston jobs has declined, both in numbers and percent, from 203,000 jobs in 1970, to 192,000 in 1980, and 182,000 in 1985, representing a steady fall in share from 37 percent in 1970, to 35 percent in 1980, and 31 percent in 1985. A recent sidewalk survey of workers entering or leaving a dozen major new office buildings found that only 22 percent of the office workers responding to a mail-in questionnaire postcard lived in Boston. Simply put, Boston's economic transformation through development has created a requirement for occupational skills not matched by that of Boston resident workers, and their access to the new jobs has been hindered thereby.

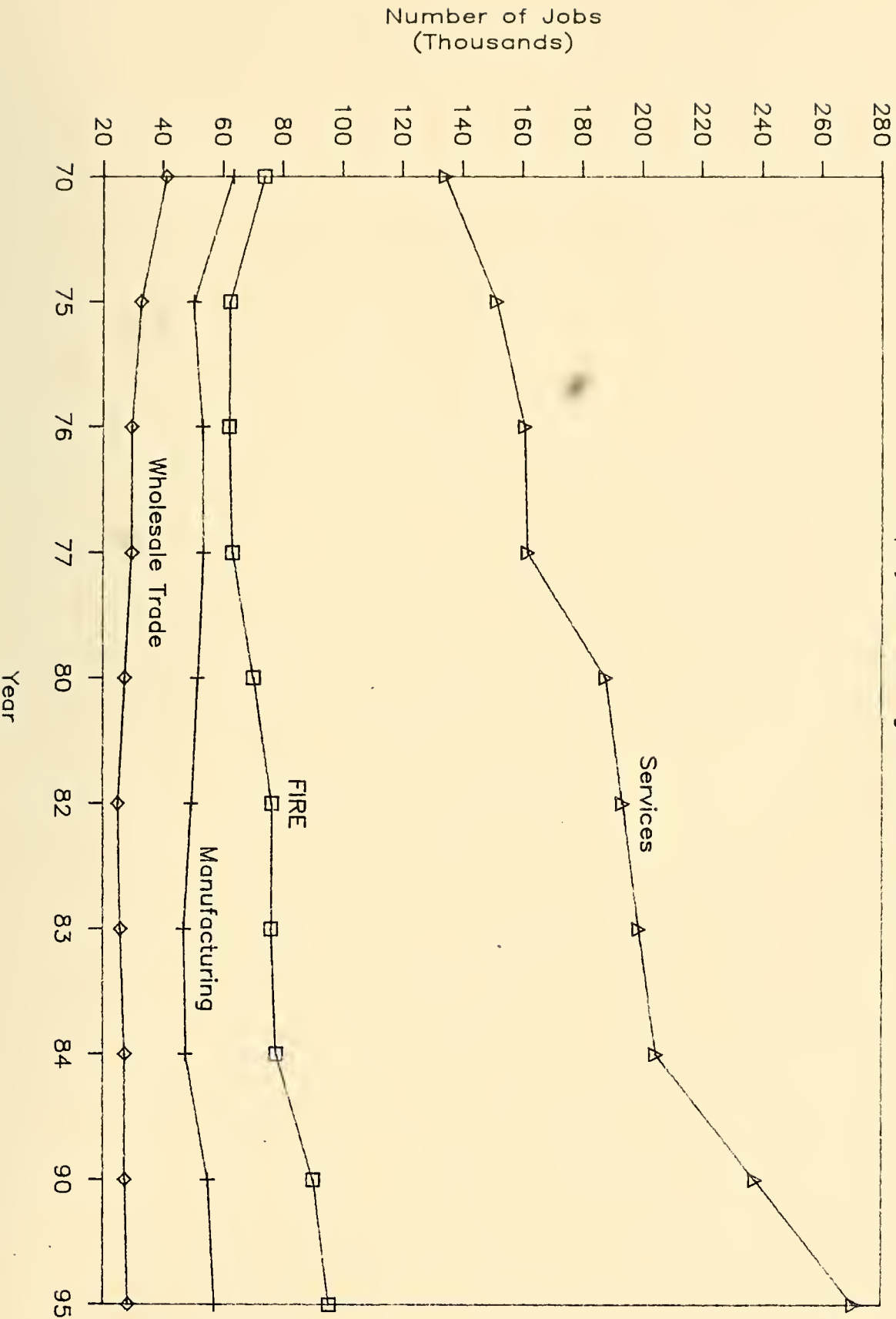
A survey of Boston's households in 1985, found that one-third of Boston resident workers had occupational skills as craftsmen, operatives, and service workers (laborers). A study of the occupations of Boston's future jobs, on the other hand, prepared for the Boston School Department Occupational Resource Center, found that 60 percent of projected job growth in the next five years would center in the professional, technical, managerial, sales and clerical occupations. Another study reveals that Boston jobs are good jobs with annual average wages

in the City greater than those for the metro area, which, in turn, are higher than the average in the state. But, in 1985, 69 percent of those jobs, including most of the better jobs, were held by suburban commuters.

Job training is needed to redress the impact of development on the job-skills mismatch and increase the access of Boston resident workers to Boston jobs. The proposed linkage payment of \$1 per square foot may be compared to the job training cost equivalent, recently estimated at \$1.74 per square foot.

City of Boston, Selected Occupations

Employment Change 1976-1995





CONFIDENTIAL

LEGAL ANALYSIS OF LINKAGE

The following is a summary of the reasons why linkage is legally supportable:

There are three principle and distinct ways the courts will classify linkage: (1) as a "normal" police power regulation, (2) as an exaction, and (3) as a tax. A court's legal reasoning will be based on the way it classifies the program.

I. Constitutional Issues

A. Linkage as a "normal" police power regulation

Zoning ordinances are almost always treated as "normal police power" regulations, as opposed to subdivision exactions which in the opinion of some courts require closer judicial scrutiny than that given most zoning ordinances.

For example, a zoning ordinance requiring a separate designation for apartment uses, is presumed to be valid and the burden of proving invalidity is on the challenger. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Caires v. Building Comm'r, 323 Mass. 589, 593 (1949).

It is usually difficult to successfully challenge a zoning ordinance to which a court applies a traditional due process, police power analysis because of this "presumption" and because the test is (1) is the goal of the regulation legitimate and (2) is the regulation a reasonable means of achieving it. Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 362 (1973).

There is evidence under state law that the promotion of affordable housing is state policy. For example, the Massachusetts Zoning Act seeks "to encourage housing for persons of all income levels." M.G.L. c. 808 Section 2A. Furthermore, Chapter 527 of the Acts of 1983, an act enabling local governments to regulate condominium conversions

finds ... that a serious emergency exists ... with respect to the housing of a substantial number of the citizens of the Commonwealth. This rental emergency has been created by a lack of sufficient new rental housing production

And the "Anti-Snob Zoning Act," M.G.L. c. 40B Section 20 et seq., confers on municipal boards of appeal the power to override local zoning decisions that exclude low- and

moderate-income housing projects. The Act was upheld in Board of Appeals of Hanover v. Housing Appeals Committee, 363 Mass. 339, 362 (1973). The Supreme Judicial Court noted that "zoning changes affording special treatment to encourage the construction of multi-family residences in cities with housing shortages promote the general welfare."

If there is any "conceivable basis" for a finding that a zoning ordinance is a reasonable means of accomplishing a legitimate governmental goal, it will be upheld. Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 544 (1974). The linkage ordinance easily meets this test. Developers are being asked to pay a small fee to mitigate the impact of their development projects on the housing market.

The other constitutional challenges that could be raised are equal protection and the "taking" issue. Typically equal protection challenges, in a zoning context, are not successful unless a suspect class or a fundamental right is involved.* Dukes v. City of New Orleans, 427 U.S. 297 (1976). The linkage ordinance does not involve a suspect class or a fundamental right.

A "taking" challenge also could be brought. This is a difficult test to meet in that the landowner must show that the regulations deprive the plaintiffs land of all practical value, leaving them only with the burden of paying taxes on it. Lovequist v. Town of Dennis Conservation Commission, 393 Mass. 858, 862 (1979); MacGibbon v. Board of Appeals, 356 Mass. 635 (1970).

The Supreme Judicial Court applied this strict taking test in Flynn v. City of Cambridge, 383 Mass. 152 (1981). The court ruled that the Cambridge rent control regulations did not constitute a taking even though it required an owner of a rental unit to get a permit before evicting a tenant or converting the unit for his own or another person's use. In other words, in certain instances the owner could be prevented from residing in his own dwelling unit. The Court stated that:

*In City of Cleburne v. Cleburne Living Center, 53 U.S.L.W. 5022 (1985), the Court arguably did apply a "heightened scrutiny" analysis (although it did not say it was doing so), to a zoning decision involving group homes. This case, however, is limited to its facts.

These owners are fairly warned that they are purchasing property which may be used for rental housing only, and presumably the purchase price reflects this use restriction.

Id. at 160. The proposed linkage amendments only impose a small cost on the developer, they do not prevent him from realizing profits or deny him the use of his land.

B. Linkage as an exaction

Massachusetts courts may treat linkage as an exaction. Exactions are typically imposed in a subdivision context where local governments require that a subdivider install capital improvements, such as streets, sidewalks and sewers, that service the subdivision. See, e.g., Brous v. Smith, 304 N.Y. 164, 106 N.E. 2d 503 (1952); Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). Many municipalities now require that the subdivider dedicate land or pay money to be used for the construction of schools and the acquisition of parks.

To determine whether a subdivision exaction regulation violates due process the courts will look to the purpose to be achieved and whether the regulation is reasonable. The courts use three tests to determine reasonableness, the most common of which is the "rational nexus" test.**

Under this test there must be a nexus between the amount of land dedicated or the money paid by the subdivider and the needs created by, and benefits conferred on, the subdivision. The rational nexus test uses a special assessment analysis***, since it correlates the amount of the exaction to the benefits conferred on the particular subdivision. Longridge Builders, Inc. v. Planning Board, 52 N.J. 348, 245 A.2d 336 (1967).

There is ample documentation supporting the need for affordable housing in Boston. Moreover, there is data to support the premise that fees imposed pursuant to the linkage program are less than the actual "costs" imposed by the commercial development on the housing market.

**The Massachusetts Courts have not had occasion to select a test.

***Special assessments are "police power" regulations to which the courts apply a more stringent standard of review than that which they apply to other ("normal") police power regulations.

II. Statutory Basis for Linkage

Regardless of whether linkage is classified as a "normal" police power regulation or as an exaction, the courts will require that there be an express or implied statutory basis for linkage.

As opposed all other local governments in Massachusetts that exercise their zoning power pursuant to the State Home Rule Amendment, Boston looks to its Zoning Enabling Act (M.G.L. c. 665 of the Acts of 1956) for its power to zone.

Chapter 665 of the Acts of 1956 gives the City a broad power to zone. While it does not expressly authorize the City to enact linkage regulations, the Act (Section 2) does provide that zoning regulations can promote the "health, safety, convenience, morals or welfare" of Boston inhabitants and can "encourage the most appropriate use of land throughout the City, and... preserve and increase its amenities." This language has been interpreted to uphold diverse regulations such as billboard ordinances, J. P. Donnelly & Sons v. Outdoor Advertising Bd., 369 Mass. 206 (1975).

Although the issue has not been litigated under Chapter 665 there is a good argument that can be made that the law implicitly supports the linkage program.

III. Is linkage a tax?

A challenge might be brought to linkage on the ground that it constitutes a tax, not a fee. For a regulation to be a fee and not a tax the money collected must bear a reasonable relationship to the service provided.

In Emerson College v. City of Boston, 462 N.E. 2d 1098 (1984) the Massachusetts Supreme Judicial Court invalidated a fee for fire protection services because the court found that the fee was used for general revenue purposes instead of being limited to cover the costs of fire protection. In Emerson College, state law conferred authority on the City of Boston to impose a fee for fire protection against the owners of certain buildings that "by reason of their size, type of construction, use and other relevant factors... require the City to employ additional firefighters, deploy additional equipment and purchase equipment different in kind from that required to provide fire protection for the majority of structures." Id. at 1100. Emerson College challenged the validity of the ordinance allowing the City to impose an exaction. Among the issues addressed by the

Supreme Judicial Court were (1) the nature of the monetary exaction and (2) whether the exaction was part of a scheme to have owners of a private property provide a service which is actually a general function of government.

Fees are either user fees, "based on the rights of the entity as proprietor of the instrumentalities used, or regulatory fees, "founded on the police power to regulate particular businesses or activities." Id. at 1100. In either case, however, fees (as opposed to taxes) are charged in exchange for particular governmental services benefitting the payor and "are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses". Id. at 1101. Also, the fees paid for services should benefit the particular group incurring the expense. In Emerson College, because the monetary payment was for possible services and would be provided to maintain facilities (fire services) which provide essential services to the general public, the court ruled that the required payment was an illicit tax.

The Boston linkage program is distinguished from the "tax" in Emerson College in that developers contribute linkage fees to help ameliorate a severe low- and moderate-income housing problem within the City. The contribution is not a source of general revenues for the general public, and it is specifically earmarked for immediate housing needs as opposed to possible needs.

IV. Jobs linkage as a "preference" program

The same challenges that could be made to the housing linkage program could also be made to the jobs linkage program, and the same standards of review would apply. However, assuming the jobs linkage program is established so that Boston residents will be afforded the necessary job training and education that will allow them to compete for the new types of jobs accommodated by new development it is possible that a privilege and immunities challenge also could be brought.

The "preference" for Boston residents in the jobs linkage program could be challenged as a violation of the privileges and immunities clause of the U.S. Constitution.

This issue was addressed in United Building and Construction Trades Council v. Mayor and Council of Camden, 465 U.S. 208 (1984). In this case, a Camden, N.J. ordinance required contractors and subcontractors on city projects to hire at least forty percent Camden residents. The Supreme Court reversed the holding of the N.J. Supreme Court that such an ordinance is not subject to privileges and immunities challenge. In so doing, the Supreme Court rejected arguments that the privileges and immunities clause only applies to states, and that an ordinance discriminating only on the basis of municipal residence cannot violate the clause. The Court found that discrimination by a municipality affects out-of-state non-residents as well as non-residents who live in other parts of the state.

The Court applied a two-pronged analysis to the municipal "preference" law in Camden. First, does the ordinance burden fundamental rights protected by the Constitution?, and second, is there a substantial reason for the discrimination and is the degree of discrimination closely tailored to that reason? The Court found that for the purposes of the privileges and immunities clause, government employment may be a fundamental right, and that Camden had not provided enough evidence to show that a substantial reason exists for the discrimination and that the degree of discrimination is closely tailored to that reason. It thus remanded the case.

This two-pronged test is frequently used by courts in reviewing "preference" laws. See, WCM Window Company, v. Bernardi, 730 F.2d 486 (7th Cir. 1984), where the court found that there was no evidence that the state law directly addressed a problem caused by non-residents. Cf. White v. Mass. Council of Construction Employees, 460 U.S. 204, 214-15 (1984) where the Supreme Court refused to decide whether municipal "preference" laws violate the privileges and immunities clause.

Wyoming v. Antioch, 694 P.2d 60 (Wyo. 1985), was the only case in which a municipal resident preference act withstood a privileges and immunities challenge. Under the two-pronged test, the Wyoming Supreme Court held that the challenged statute contained "certain distinguishing features which sufficiently limited its scope so as to satisfy the privileges and immunities clause." The court found that because the State did not attempt to eradicate general unemployment and the statute was narrowly tailored to prevent an evil of which non-residents were a "peculiar source", that although the statute did burden a protected right, it did not violate the privileges and immunities clause.

Boston's job linkage program is narrowly tailored to protect its residents from being displaced from the Boston jobs market. It does not attempt to use resident preference to remedy general unemployment and discrimination problems. Thus, although it may be found that Boston's linkage program burdens a protected right to employment in the City, the City has strong reasons for its program and it is "the least restrictive means" to accomplish these goals. In light of the cited "preference" cases, Boston might successfully withstand a privileges and immunities challenge to its job linkage program.

STATUS OF PENDING

INCLUSIONARY ZONING AND LINKAGE LITIGATION

Boston - Sean P. Bonan v. The General Hospital Corporation. Defendant's Memorandum in Support of the BRA's motion to dismiss the complaint was heard by the Superior Court on September 13, 1985. A group of property owners and developers in Boston have brought suit against the BRA, M.G.H., the City of Boston and the Boston Zoning Commission, alleging that the plaintiffs are aggrieved abutters of M.G.H. and challenge the approval by the above city agencies of M.G.H.'s amended Planned Development Area proposal. The approval was granted on the condition that, inter alia, certain fees be paid to the City under Article 26 of the Boston Zoning Code. The memorandum alleges that the plaintiffs have failed to state a claim upon which relief can be granted and that the plaintiffs lack standing.

Defendant's memorandum notes that even if plaintiffs did have standing, the plaintiffs have no cause of action regarding linkage as a matter of law. The defendants look to the broad power given to the City and its agencies to zone. In light of this broad power, "every presumption is to be made in favor of the... [ordinance] unless it is shown beyond reasonable doubt that it conflicts with the enabling act." Defendants also submit that a "substantial relationship" test should be applied by the Court to determine whether the zoning provision is in furtherance of the general purposes set forth in the zoning enabling act.

Additionally, the defendants cite Board of Appeals of Hanover v. Housing Appeals Committee in Department of Community Affairs, 363 Mass. 338 (1973) where the Court reaffirmed its recognition that "zoning changes affording special treatment to encourage the construction of multi-family residences in cities with housing shortages promote the public welfare."

Newton - Michael F. Iodice v. The City of Newton and The Newton Housing Authority. Case argued in December 1985 before the Massachusetts Supreme Judicial Court. The City of Newton was sued on the grounds that its use of incentive zoning to encourage developers to provide low-income housing units was invalid. In 1976, the plaintiff petitioned the Newton Board of Alderman for a special permit to develop townhouse and garden apartment units at a higher density than that permitted as-of-right under the zoning code. In 1977, the Board approved construction of 76 residential units and required the developer to reserve eight dwelling units as low income housing, pursuant to a recently enacted

Newton incentive zoning ordinance. Subsequently, the plaintiff challenged Newton's Ordinance 212 which permits the Board of Alderman to implement the provisions of M.G.L. c. 40A Section 9 through special permit as being beyond the zoning power and as violating the takings and equal protection clauses.

The City of Newton alleged that Section 9 and Ordinance 212 serve a legitimate public purpose and are reasonable means to achieve the legitimate public purpose, and thus are within the zoning power. Also, because the plaintiff is not similarly situated with other parties and there is a rational basis for the different density/housing tradeoffs, the ordinance does not violate equal protection. Additionally, because the plaintiff is not denied his economically viable use of his property the ordinance is not a taking. And last, the plaintiff, who expressly promised that he would not contest the legal validity of Ordinance 212 and who confirmed such promises through subsequent conduct for more than three years is estopped from bringing the above claims.

San Francisco - Russ Building Partnership v. San Francisco, unpublished trial court decision, September, 1984. On the basis of a discussion with the City attorney we learned that San Francisco has an ordinance requiring commercial developers to pay fees for transit facilities. New development within the downtown San Francisco area is subject to a \$5.00 per square foot transit fee. The developers who had already obtained permits before the ordinance was adopted were given the option of paying the fee immediately or making installment payments. Those who develop subsequent to the adoption of the ordinance are required to pay the fee before they get a certificate of occupancy. Developers sued, arguing that (1) the city had not shown there was a factual basis for the alleged relationship between commercial development and the need for additions to the transit systems and (2) the "fee" imposed constituted an invalid tax. Interestingly enough, one plaintiff developer argued that the fee was too low, maintaining that \$6.00-\$9.00 per square foot was the amount that should have been charged (if such a fee was legal).

The trial court upheld the ordinance, finding there was a "rational nexus" between the impact of commercial development on transit systems and the fee. The fee was appropriate, particularly since expert consultants had been hired to do the necessary computations.

Princeton - Calton Homes, Inc. v. Princeton Township, hearing on parties' on Cross Motions/or Summary Judgment and Partial Summary Judgment, no decision handed down. A Princeton subdivision ordinance provides that developers building job-generating uses must make contributions to be used for affordable housing. The ordinance was challenged as an invalid exercise of both the zoning power and the police power and as being in violation of the due process and equal protection clauses of the state constitution. Princeton did not show the statistical basis for the alleged relationship between the development projects and the need for affordable housing. Princeton takes the position that such a relationship does not have to be shown; that it is sufficient that the goal of the ordinance is a legitimate governmental goal and that the "Affordable Housing Contribution" requirement is rationally related to that goal. Princeton also argues that it has implicit authority to impose this requirement under the state's subdivision exaction statute and that Mount Laurel II (communities have an affirmative obligation to provide for their fair share of low- and moderate-income housing) provides strong justification for the establishment of programs such as this one.



REVISED DRAFT PROPOSED
HOUSING CREATION REGULATIONS UNDER ARTICLE 26
OF THE BOSTON ZONING CODE

Section 1: Scope and Purpose

The City of Boston, in recognition of the existence of a crisis in the availability of affordable housing for its low and moderate income households, has enacted Article 26 of the Boston Zoning Code. Article 26 requires Developers of certain projects, known as Development Impact Projects, to contribute to the alleviation of the City's housing shortage by satisfying a Development Impact Project Exaction. The Development Impact Project Exaction is an amount equal to Five Dollars per square foot for every square foot of gross floor area (exclusive of accessory parking garage space) in excess of one hundred thousand square feet for any development project proposed within the City which requires a variance, conditional use permit, exception, or zoning map or text amendment and which project is intended for a use for which the use item number is listed in Table C, Section 26-3 of the Boston Zoning Code. Developers may elect from two options in order to satisfy their obligations under Article 26: 1) Housing Exaction Payments may be made in twelve equal annual installments beginning on the date of the issuance of a certificate of occupancy for the Development Impact Project or twenty four months after a building permit has been granted for said project, whichever occurs first (the "Housing Payment Option"), or 2) Developers may create or contribute to the creation of housing affordable to low and moderate income households pursuant to these regulations (the "Housing Creation Option").

Article 26 requires the Boston Redevelopment Authority to promulgate regulations governing the administration of the Housing Creation Option. These regulations set forth procedures and requirements for Developers who have elected to satisfy their obligations under Article 26 through the Housing Creation Option and are intended to encourage Developers to select the Housing Creation Option.

Section 2: Definitions

The following terms, wherever used in these regulations, shall have the following meanings, unless the context clearly requires otherwise:

- (a) "Authority" shall mean the Boston Redevelopment Authority, a public body politic and corporate duly organized and existing under Massachusetts General Laws Chapter 121B.

- (b) "CDC" (Community Development Corporation), shall mean [an organization composed of residents of a specific neighborhood, that develops residential or commercial property] a corporation duly organized and existing pursuant to Massachusetts General Laws Chapter 121B.
- (c) "Certificate of Compliance" shall mean a certificate approved by the Authority which certifies that a Developer's obligations under [Article 26 of the Boston Zoning Code and the] a Housing Creation Agreement [required by these regulations] have been satisfied.
- (d) "Developer" shall mean an individual, corporation, business trust, estate trust, partnership or association, two or more Developers having a joint or common interest, or any other legal or commercial entity subject to [the Development Impact Project Exaction set forth in] Article 26 of the Boston Zoning Code.
- (e) "Director" shall mean the Director of the Boston Redevelopment Authority.
- (f) "Housing Affordable to Low and Moderate Income Households" shall mean, in the case of rental housing, units where the maximum rent, including utilities, for which Low and Moderate Income Households shall be responsible shall not exceed thirty percent of the household's gross income, and in the case of equity housing, units where the total costs, after state and federal income taxes, for mortgage payments, insurance, utilities, and real estate taxes do not exceed thirty percent of the household's gross income.
- (g) "Housing Creation Option" shall mean the means as set forth in these regulations by which a Developer shall satisfy its obligations under Article 26 of the Boston Zoning Code if electing the Housing Creation Exaction Option. [as set forth in these Regulations.]
- (h) "Housing Payment Option" shall mean the means by which a Developer shall pay the amount calculated pursuant to Article 26 of the Boston Zoning Code which [a] the Developer is required to pay if electing the Housing Payment Exaction option thereunder.
- [(i) "Housing Policy Group" shall mean a five person policy group appointed by the Mayor of the City of Boston.]

- (i) "Low Income Household" shall mean a household where the total income does not exceed fifty percent of the median income for the Boston Standard Metropolitan Statistical Area as set forth in or calculated based upon regulations promulgated from time to time by the United States Department of Housing and Urban Development pursuant to Section 8 of the Housing Act of 1937, as amended by the Housing and Community Development Act of 1974.
- (j) "Neighborhood Housing Trust" shall mean the Trustees of the Neighborhood Housing Trust.
- (k) "MBE" (Minority Business Enterprise) shall mean a business organization in which at least fifty-one percent (51%) of the beneficial ownership is held by one or more minority persons.
- (l) "Minority Person" shall mean an individual who is Black, Hispanic, Asian or American Indian.
- (m) "Moderate Income Household" shall mean a household where the total income does not exceed eighty percent (80%) of the median income for the Boston Standard Metropolitan Statistical Area as set forth in or calculated based upon regulations promulgated from time to time by the United States Department of Housing and Urban Development pursuant to Section 8 of the Housing Act of 1937, as amended by the Housing and Community Development Act of 1974.
- (n) "Net Present Value" shall mean the amount of money equal to the sum of discounted payments which would have been made by the Developer had it elected to satisfy its obligations under Article 26 of the Boston Zoning Code through the Housing Payment Option, such discounting to be measured from the date at which the Developer enters into a Housing Creation Agreement with the Authority to the dates at which each Housing Payment installment payment would have been made.
- (o) "Seed Money" shall mean money placed in a revolving fund to be administered by the [Authority] Neighborhood Housing Trust for low-interest loans to MBE's, CDC's, or other [neighborhood based] for-profit or non-profit organizations for the purpose of encouraging the housing creation activities contemplated by these regulations.

Section 3: Housing Creation Options

A Developer who elects to satisfy its obligation under Article 26 of the Boston Zoning Code through the Housing Creation Option may propose to the Director, in accordance with the requirements of these Regulations, that it fulfill all or any part of its obligation by methods such as but not limited to the following: [either:]

- (a) Directly creating through new construction, acquisition/rehabilitation or purchase, housing which is affordable to low and moderate income households;

Example: A Developer having a linkage obligation of \$500,000 (Net Present Value), acquires and constructs 15 townhouse family housing units at a total cost of \$1,200,000. The units are then sold to low and moderate income home buyers at prices totaling \$700,000. The Developer has underwritten the housing so produced to the extent of the linkage obligation.

or

- (b) Entering into a joint venture for the creation of housing affordable to low and moderate income households with an MBE, CDC, or [neighborhood-based] for-profit or non-profit organization. The Developer shall ensure that any joint venturor of the Developer's shall become a party to the Housing Creation Agreement required pursuant to Section 9, and be bound by all of the terms and conditions of the Agreement;

Example: The Developer invests the \$500,000 linkage obligation (Net Present Value) as a limited partner in a rental housing development of which a qualifying MBE, CDC or for-profit or non-profit [neighborhood-based] organization is the controlling general partner. This equity permits the general partner to obtain project financing which will result in the production of more housing units than would have otherwise been possible.

or

- (c) Contributing the Net Present Value of the payments which would have been made under the Housing Payment Option to an entity designated by the Developer and approved by the Authority, which

entity shall be responsible for the construction and operation of housing units that are affordable to low and moderate income households. The Developer shall ensure that any entity so designated and approved shall become a party to the Housing Creation Agreement required pursuant to Section 9, and be bound by all of the terms and conditions of the Agreement.

Example: The Developer loans \$500,000 on favorable terms to an MBE, CDC or for-profit or non-profit [neighborhood-based] organization as primary or subordinated permanent project financing. As the interest rate is well below market rates, more affordable rental or equity housing is produced. The Developer assigns its interest in the Loan to the BRA, thus discharging its linkage obligation.

or

- (d) Selecting any of the options above or any combination of the options above in full or partial satisfaction of its obligations under Article 26.

Example: The Developer, wishing to satisfy half of its linkage obligation currently and electing to pay the remainder over 12 years, invests \$250,000 as a limited partner in a new housing development sponsored by an MBE, CDC or for-profit or non-profit [neighborhood-based] organization. The remaining linkage obligation is satisfied according to the requirements of the Housing Payment Option.

Section 4: Housing Creation Proposal Review Criteria
[Section 4: Special Consideration for Certain Proposals]

All proposals shall be evaluated according to criteria which shall include but not be limited to the following:

[Special consideration shall be given to proposals submitted pursuant under Section 3 which:]

(a) provide equity ownership opportunities for Low and Moderate Income Households;

(b) maximize the number of units of housing available to Low and Moderate Income Households; and

(c) will result in the rehabilitation of abandoned housing or the improvement of blighted areas in the City.

Section 5: Satisfaction of Linkage Obligation; Equivalent Value

The Developer's obligations under Article 26 shall be satisfied under Section 3 if and only if the [total] amount of the Developer's contribution under any of the options set forth in Section 3 is equal to the Net Present Value of the payments that would have been made by the Developer had it elected the Housing Payment Option. Net Present Value shall be determined by applying a composite discount rate to the [said] payments that the Developer would have made under the Housing Payment Option. [under Article 26.] The discount rate shall be calculated by adding fifty percent of the Developer's verified cost of funds for its Development Impact Project to fifty percent of the current most recent City of Boston long-term (ten year) municipal bond yield.

Section 6: Housing Creation Proposal

A Developer electing the Housing Creation Option shall submit to the Director a proposal setting forth the Developer's plan for creating housing that is affordable to Low and Moderate Income Households which would not have been built but for the Developer's contribution. The proposal shall comply with the submissions requirements set forth in the Development Review Procedures as published by the Authority from time to time and shall contain such other information as the Director may require.

Section 7: Review by Neighborhood Housing Trust
[Section 7: Review by Housing Policy Group]

The Director shall submit the proposal to the Neighborhood Housing Trust [Housing Policy Group] which shall review the proposal and determine its financial feasibility and overall appropriateness. The Neighborhood Housing Trust [Housing Policy Group] shall recommend to the Authority approval, with or without conditions, or denial of each proposal.

Section 8: Proposal Approval

Upon completion of review of the proposal by the Neighborhood Housing Trust [Housing Policy Group] and the Authority, and upon the Director's recommendation, the Authority shall take final action on the Developer's proposal and shall notify the Developer of its action in writing.

Section 9: Housing Creation Agreement

Upon approval of the proposal by the Authority, the Director and the Developer shall execute a Housing Creation Agreement. The Housing Creation Agreement shall be in a format prescribed by the Authority and contain such provisions as the Director and the Neighborhood Housing Trust determine[s] necessary to ensure the completion of the project in accordance with the Developer's proposal as approved by the Authority.

Section 10: Certificate of Compliance

Upon satisfactory performance of its obligations under [completion of the project in accordance with] the terms of the Housing Creation Agreement and if so requested by the Developer [to the satisfaction of the Authority], the Authority shall issue to the Developer a Certificate of Compliance.

Section 11: Seed Money Loans

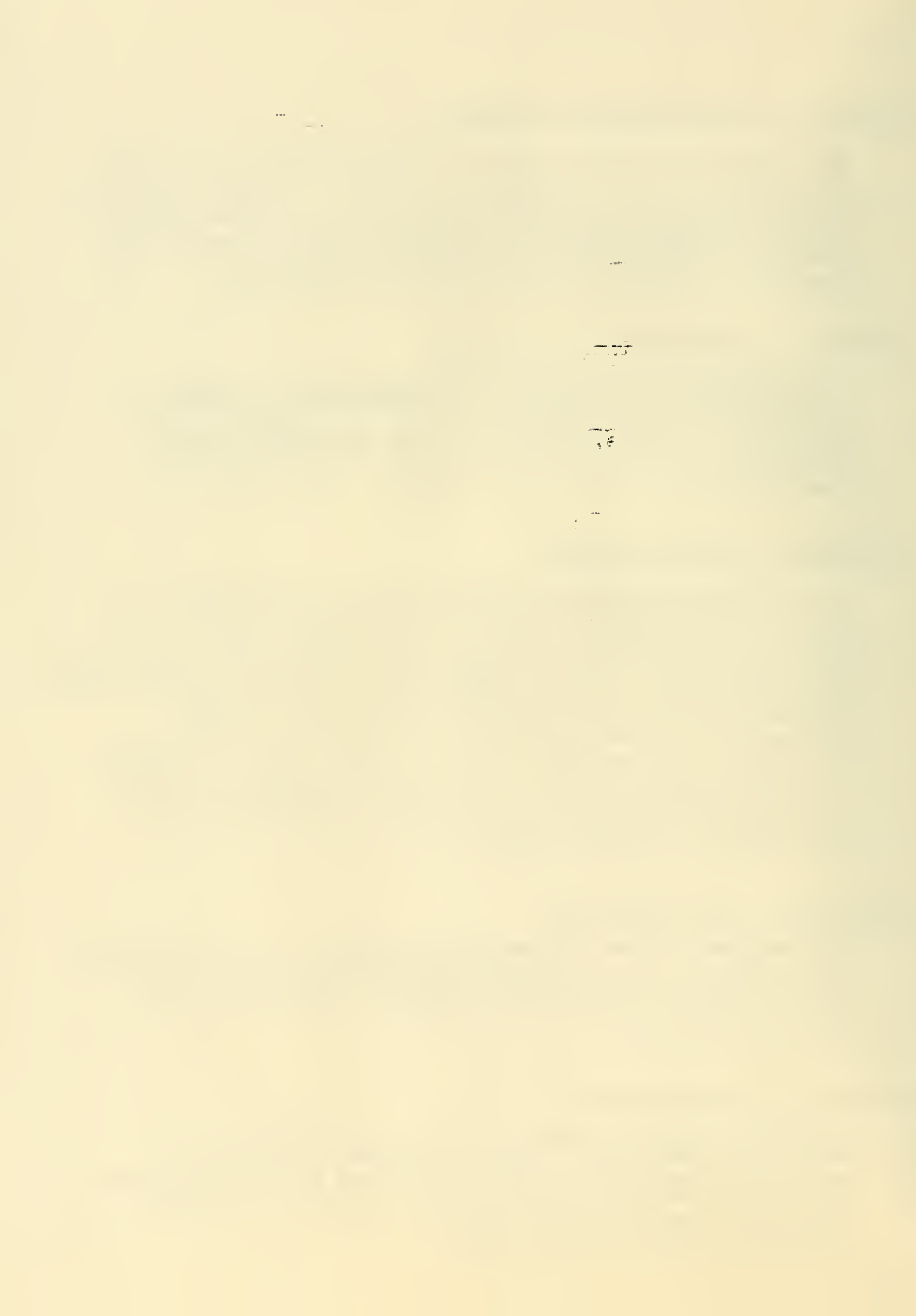
If a Developer selects the option set forth in Section 3(c), up to five percent (5%) of the Developer's contribution shall be set aside and placed in a seed money revolving fund to be administered by the Neighborhood Housing Trust [Authority]. Such funds may be loaned to MBE's, CDC's or other [neighborhood-based] for-profit or non-profit organizations for the purpose of encouraging the housing creation activities contemplated by these regulations. The interest rates on such loans shall be equal to fifty percent (50%) of the City of Boston current long-term (ten year) municipal bond yield. [The housing policy group shall advise the Authority as to the financial feasibility and overall appropriateness of requests for seed money loans.]

Section 12: Section Headings

The captions to the sections used throughout these Regulations are intended solely to facilitate the reading of and reference to the sections and provisions of these Regulations. The captions shall not affect the meaning or interpretation of these Regulations.

Section 13: Severability

If any provision or section of these Regulations shall be held to be invalid by a court of competent jurisdiction, such provision or section shall be deemed to be separate and apart from the remaining provisions or sections of these Regulations and such remaining provisions or sections shall continue in full force and effect.



Approved and voted this _____ day of _____, 1985.

Robert L. Farrell, Chairman

Joseph J. Walsh, Vice-Chairman

James K. Flaherty, Treasurer

Clarence J. Jones, Vice-Treasurer

Michael F. Donlan, Member

Kane Simonian, Secretary

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